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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

—o—

MARTIN HARRIS, *et al.*,
Plaintiffs-Respondents,

v.

IRENE PERNSLEY, *et al.*,
Defendants-Respondents,

RONALD D. CASTILLE,
District Attorney of Philadelphia County,
Proposed Intervenor-Petitioner.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Is the Philadelphia District Attorney, who has an interest in protecting valid prison incarceration orders, entitled to intervene in a prison conditions lawsuit which plaintiff inmates and municipal official defendants plan to settle by consenting to the release of inmates?

2. Absent any constitutional or federal law violations, does the supremacy clause permit a federal court to approve a consent decree which overrides state statutory law, case law, and judicial orders where the settling parties could not otherwise lawfully undertake such actions?

3. Is certiorari also warranted to resolve the conflict among the circuits as to whether an abuse of discretion standard of review or a plenary or *de novo* standard of review should be applied in ruling on motions to intervene as of right?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	v
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	10
IA. Petitioner, the Philadelphia District Attorney, has an interest in protecting valid prison incarceration orders. He, therefore, should be permitted to intervene in a prison conditions lawsuit, which plaintiff inmates and municipal defendants-respondents plan to settle by consenting to the release of inmates.	10
IB. Absent proven constitutional violations, parties may not invoke the supremacy clause to settle a prison conditions lawsuit on terms which override state law and state judicial orders and which authorize actions that could not otherwise lawfully be undertaken.	20
II. Certiorari is also necessary to resolve the conflict among the circuits as to whether an abuse of discretion or plenary standard of review should be used in ruling on motions to intervene as of right.	26
Conclusion	30

CONTENTS OF SEPARATELY BOUND APPENDIX

Page

Opinion, *Harris v. Pernsley I*, Third Circuit panel ..... App. 1- 32

Opinion, *Harris v. Pernsley I*, Third Circuit *en banc* ..... App. 33- 40

Opinion, *Pernsley v. Harris*, United States Supreme Court, dissent from denial of certiorari ..... App. 41- 44

Memorandum and Order, *Harris v. Pernsley II*, District Court, December 30, 1986, denying motion to intervene ..... App. 45- 68

Order, *Harris v. Pernsley II*, District Court, December 30, 1986, approving consent decree ..... App. 69- 76

Memorandum and Order, *Harris v. Pernsley II*, District Court, February 19, 1987, denying stay ..... App. 77- 99

Order, *Harris v. Pernsley II*, Third Circuit, March 6, 1987, granting stay ..... App. 100

Opinion, *Harris v. Pernsley II*, Third Circuit panel ..... App. 101-146

Judgment, *Harris v. Pernsley II*, Third Circuit ..... App. 147-149

Order, *Harris v. Pernsley II*, Third Circuit, June 9, 1987, granting stay continuance ..... App. 150

Order and Opinion, *Harris v. Pernsley II*, Third Circuit *en banc*, denial of petition for rehearing, dissenting opinion, order vacating stay ..... App. 151-155

Order, *Castille v. Harris*, United States Supreme Court, July 23, 1987, temporary stay granted ..... App. 156-158

TABLE OF CONTENTS—Continued

Page

Order, *Castille v. Harris,* United States Supreme Court, August 3, 1987, stay denied .....App. 159

Excerpts from brief filed by municipal defendants-respondents in *Jackson v. Hendrick* .....App. 160-171

Federal Rule of Civil Procedure 24(a) and 24(b) .....App. 172

Pa.Stat.Ann., tit. 16, § 1402(a) (Purdon Supp. 1987) .....App. 172

Pa.R.Crim.P., Rule 4004, 42 Pa.C.S.A. .....App. 173

Pa.Stat.Ann., tit. 61, § 314 (Purdon 1964) .....App. 173-174

Pa.Stat.Ann., tit. 61, § 331.26 (Purdon 1964) ...App. 174-175

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams v. Bell, 711 F.2d 161 (D.C. Cir. 1983) (*en banc*), *cert. denied,* 465 U.S. 1021 (1984) 20

Ashley v. City of Jackson, Mississippi, 464 U.S. 900 (1983) 20

Badgely v. Santacroce, 800 F.2d 33 (2d Cir. 1986), *cert. denied,* 107 S.Ct. 955 (1987) 23

Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983), *aff'd,* 803 F.2d 46 (2d Cir. 1986), *cert. denied,* 107 S.Ct. 1358 (1987) 21

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) 29

Bushey v. New York Civil Service Commission, 469 U.S. 1117 (1985) 24

Central States, Southeast & Southwest Areas Health and Welfare Fund v. Old Security Life Insurance, 600 F.2d 671 (7th Cir. 1979) 27

Citizens for a Better Government v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1219 (1984) 25

Cobb v. Aytch, 539 F.2d 297 (3d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977) 14

Commonwealth v. Westinghouse Electric Corp., 542 F.2d 214 (4th Cir. 1976) 27

Commonwealth v. Rizzo, 530 F.2d 501 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976) 12

County of Orange v. Air California, 799 F.2d 535 (9th Cir. 1986), *cert. denied,* 107 S.Ct. 1605 (1987) 27

Delno v. Market Street Railway, 124 F.2d 965 (9th Cir. 1942) 28

Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986) 20

TABLE OF AUTHORITIES—Continued

Page

Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985) 25

Firefighters Local Union v. Stotts, 467 U.S. 561 (1984) 24

Forward v. Gernert, 287 F. Supp. 680 (E.D. Pa. 1968) 15

Gonce v. Redman, 780 F.2d 333 (3d Cir. 1985) 15

Graddick v. Newman, 453 U.S. 928 (1981) 10

Harris v. Pernsley, 755 F.2d 338 (3d Cir. 1985), *reh'g denied*, 758 F.2d 83 (3d Cir. 1985) (*en banc*), *cert denied*, 106 S.Ct. 331 (1985) 5

H. L. Hayden v. Siemens Medical Systems, Inc., 797 F.2d 85 (2d Cir. 1986) 27

Leslsz v. Kavanagh, 807 F.2d 1243 (5th Cir. 1987) 24

Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) 28

Local Number 93 v. City of Cleveland, 106 S.Ct. 3063 (1986) 25

Maryland v. United States, 460 U.S. 1001 (1983) 23, 24

Matarese v. LeFevre, 801 F.2d 98 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1353 (1987) 15

Mummau v. Ranck, 531 F. Supp. 402 (E.D. Pa. 1982), *aff'd*, 687 F.2d 9 (3d Cir. 1982) 19

Olden v. Hagerstown Cash Register, Inc., 619 F.2d 271 (3d Cir. 1980) 12

Overton v. City of Austin, 748 F.2d 941 (5th Cir. 1984) 23, 24

Pernsley v. Harris, 106 S.Ct. 331 (1985) 5, 11

Rhodes v. Chapman, 452 U.S. 337 (1981) 4

TABLE OF AUTHORITIES—Continued

Page

San Francisco v. San Francisco Police, 621 F. Supp. 1221 (N.D. Cal. 1985) 23

Samayoa v. Chicago Board of Education, 807 F.2d 643 (7th Cir. 1986) 20

Sames v. Gable, 732 F.2d 49 (3d Cir. 1984) 28

Society Hill Civic Association v. Harris, 632 F.2d 1045 (3d Cir. 1980) 20, 24

Stringfellow v. Concerned Neighbors in Action, 107 S.Ct. 1177 (1987) 28

Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 12

United States v. Allegheny Ludlum Industries, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) 27

United States v. A.T.T., 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, Maryland v. United States, 460 U.S. 1001 (1983) 23, 24

United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968 (2d Cir. 1984) 27

Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983) 23, 24

STATE CASES

Commonwealth ex rel. Carroll v. Tate, 442 Pa. 45, 274 A.2d 193, *cert. denied*, 402 U.S. 974 (1971) 13

Commonwealth ex rel. Specter v. Bauer, 437 Pa. 37, 261 A.2d 573 (1970) 14, 19

Commonwealth v. Heiser, 330 Pa. Super. 70, 478 A.2d 1355 (1984) 17

TABLE OF AUTHORITIES—Continued

	Page
Commonwealth v. Hobson, 306 Pa. Super. 99, 452 A.2d 22 (1982)	17
Commonwealth v. Mitchell, 242 Pa. Super. 543, 364 A.2d 406 (1976)	18
Commonwealth v. Sheridan, 348 Pa. Super. 574, 502 A.2d 694 (1985)	19
Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972)	17
Commonwealth v. Yoder, 249 Pa. Super. 389, 378 A.2d 350 (1977)	17
County of Allegheny v. Commonwealth, 507 Pa. 360, 490 A.2d 402 (1985)	21
In re Miller, 209 Pa. Super. 47, 224 A.2d 89 (1966)	16
Jackson v. Hendrick, 10 Pa. Commw. 392, 309 A.2d 187 (1973)	4
Jackson v. Hendrick, 457 Pa. 405, 321 A.2d 603 (1974)	4
Jackson v. Hendrick, 72 Pa. Commw. 63, 456 A.2d 229 (1983)	16
Jackson v. Hendrick, 509 Pa. 456, 503 A.2d 400 (1986)	5
Jackson v. Hendrick, Memorandum Opinion and Order of October 17, 1984	22

FEDERAL CONSTITUTION AND STATUTES

United States Constitution, article VI	2
United States Constitution, amendment eight	3
United States Constitution, amendment fourteen	3
28 U.S.C.A. § 2072 (West 1982)	28

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C.A. § 1983 (West 1982) 2, 3

Fed.R.App.P. 35 9

Fed.R.App.P. 41 9

Fed.R.Civ.P. 24 ..... 6, 27, 28

PENNSYLVANIA STATUTES AND RULES

Pa.R.A.P., Rule 1763 16

Pa.R.Crim.P., Rule 1401 22

Pa.R.Crim.P., Rule 1410 16

Pa.R.Crim.P., Rule 4003 22

Pa.R.Crim.P., Rule 4004 ..... 17, 22

Pa.Stat.Ann. tit. 16, § 1402(a) (Purdon Supp. 1987) 19

Pa.Stat.Ann. tit. 42, § 9717(a) and (b) (Purdon Supp. 1987) 19

Pa.Stat.Ann. tit. 42, § 9751 (Purdon 1982) 22

Pa.Stat.Ann. tit. 42, § 9762(3) (Purdon 1982) 21

Pa.Stat.Ann. tit. 61, § 314 (Purdon 1964) 17

Pa.Stat.Ann. tit. 61, § 331.1 (Purdon 1964) 17

Pa.Stat.Ann. tit. 61, § 331.26 (Purdon 1964) 17

Philadelphia Home Rule Charter 5-700(c) 22

Phila.Crim.R. 500-520 18

MISCELLANEOUS

Shreve, Questioning Intervention of Right—Toward A New Methodology of Decisionmaking, 74 Nw.U.L.Rev. 894 (1980) 27

The New York Times, "Crowded Jails: Hard Solutions," B1 (August 14, 1987) 21

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Petitioner, Ronald D. Castille, District Attorney of Philadelphia County, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this matter. The opinion was filed on May 15, 1987, and the court's judgment and mandate were entered on June 23, 1987.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, for which review is sought, is reported at 820 F.2d 592, and reprinted in the appendix (App.) at App. 101-146.

The immediately preceding memorandum decisions of the United States District Court for the Eastern Dis-

trict of Pennsylvania (Shapiro, D.J.) have been reported at 113 F.R.D. 615, 654 F. Supp. 1042, and 654 F. Supp. 1057. They are reprinted at App. 45-99. Earlier Third Circuit and District Court decisions, entered during the course of the litigation, are reprinted at App. 1-40.

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STATEMENT OF JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the plaintiffs-respondents brought suit against defendants-respondents in the Eastern District of Pennsylvania. Petitioner subsequently sought to intervene as of right. This motion was denied on December 30, 1986, by the assigned District Court judge, the Honorable Norma L. Shapiro. App. 45-68. On May 15, 1987, a divided Third Circuit panel affirmed Judge Shapiro's order. App. 101-149. Next, on June 15, 1987, the full Third Circuit, in a divided vote, denied rehearing. App. 151-155. On June 23, 1987, the Third Circuit's judgment and mandate were issued. App. 147-149.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, article VI, which provides:

> This constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be

> bound thereby, any Thing in the Constitution or Laws of any state to the Constitution notwithstanding.

United States Constitution, amendment eight, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, amendment fourteen, which provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Directly pertinent statutes and rules are reproduced at App. 171-175.

STATEMENT OF THE CASE

On April 30, 1982, ten inmates filed a *pro se* complaint in the United States District Court for the Eastern District of Pennsylvania seeking damages and injunctive relief for themselves and for a class consisting of all inmates who had been incarcerated at Holmesburg Prison, one of the Philadelphia, Pennsylvania, county prisons. Pursuant to 42 U.S.C. § 1983 (1982), appointed counsel for plaintiffs-respondents filed an amended complaint on April 19, 1983, alleging that members of the class had been subjected to conditions at Holmesburg in violation of the eighth and fourteenth amendments. The amended complaint named

as defendants the City of Philadelphia and various municipal officials, including the Mayor (collectively, the municipal defendants-respondents), as well as two state officials —Jay C. Waldman, General Counsel for the Commonwealth, and Ronald J. Marks, Commissioner of the Pennsylvania Bureau of Corrections. On January 3, 1984, District Court Judge Norma L. Shapiro granted the defendants' motions to dismiss on the grounds of *res judicata* and absention, in light of the parallel state action on prison conditions.[1]

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[1]In February of 1971, five inmates of the Philadelphia prison system instituted an equitable class action in the Philadelphia Court of Common Pleas attacking the constitutionality of their conditions of confinement and requesting injunctive relief. On April 7, 1972, a three-judge court held that the then-existing conditions in the Philadelphia County prisons violated the United States and Pennsylvania Constitutions. The *decree nisi* appointed a Prison Master to administer the court's corrective decree; the three-judge state court retained jurisdiction and continued to issue remedial orders and to approve consent decrees entered into by the parties. *See Jackson v. Hendrick,* 10 Pa. Commw. 392, 309 A.2d 187 (1973). On June 7, 1972, the decree, which was later affirmed by the Pennsylvania Supreme Court, became final. *See Jackson v. Hendricks,* 457 Pa. 405, 321 A.2d 603 (1974) (Supreme Court granted discretionary review only to consider the appointment of a master).

The City of Philadelphia subsequently instituted and funded a wide range of reforms to alleviate the conditions found constitutionally unacceptable in 1972. As a consequence, the conditions found improper over fifteen years ago have long since been eliminated, and no findings have been made, in either state court or federal court, of any presently existing unconstitutional conditions. On January 16, 1987, the Pennsylvania Supreme Court assumed extraordinary jurisdiction over the state action and vacated a contempt order against the municipal defendants for failing to comply with population limits which had been earlier fixed by the three-judge *Jackson v. Hendrick* court. In light of *Rhodes v. Chapman,* 452 U.S. 337 (1981), and statutory repeals, the state Supreme Court held that the

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Judge Shapiro's order was reversed by the Third Circuit on February 22, 1985, *see Harris v. Pernsley* [*I*], 755 F.2d 338 (3d Cir. 1985), which on March 21, 1985, with five of the ten circuit judges dissenting, denied the defendants' petitions for rehearing *en banc, see Harris v. Pernley* [*I*], 758 F.2d 83 (3d Cir. 1985) (Judges Adams, Hunter, Garth, Weis and Becker would have granted the petition for rehearing). On November 4, 1985, this Court, with three Justices dissenting, denied *certiorari. See Pennsley v. Harris,* 106 S.Ct. 331 (1985) (Chief Justice Burger, Justice, now Chief Justice, Rehnquist, and Justice O'Connor dissenting).

Plaintiffs-respondents and the municipal defendants-respondents then entered into settlement negotiations and counsel for the plaintiffs filed a second amended complaint which sought to increase the proposed class to include all persons who had been inmates in the entire Philadelphia prison system. Negotiations culminated in a proposed consent decree ("Proposed Consent Decree I"), which was forwarded to the district court on August 15, 1986, before either the first amended complaint or the proposed second amended complaint had been answered by the settling defendants. At that point, no discovery had been conduct-

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legal basis for a "one man, one cell" population limit previously ordered had been eroded, and remanded the case to the Common Pleas Court because a fresh consideration of the "totality of the circumstances was required to determine whether conditions of confinement in the Philadelphia prisons are unconstitutional." *Jackson v. Hendrick,* 509 Pa. 456, 470, 503 A.2d 400 (1986). No such determination has yet been made by the state court.

ed, no new motions had been filed or legal rulings made, and the class action had not been certified.

Proposed Consent Decree I established rules for expediting preliminary hearings, probation hearings, trials and sentencings. Narrow exceptions, which could result in limited extensions of those time periods, were recognized for trial and preliminary hearing schedules, but not for the sentencing or probation revocation proceedings. Non-compliance with these mechanical timetables mandated the release of prisoners. The proposed decree also automatically shortened by thirty (30) days to seventy-five (75) days all judicially-imposed sentences to be served in the Philadelphia prisons and provided that petitioner, the chief prosecutor for the city, could not object to releases except in very limited circumstances. Although this decree rated the prisons' capacity as 4,900, it required the release mechanisms to take effect whenever the population exceeded 3,200.

On August 18, 1986, three days after the proposed decree's submission to the district court, petitioner, the Philadelphia District Attorney, sought to intervene as of right pursuant to Fed.R.Civ.P. 24. The settling parties (plaintiffs-respondents and the municipal defendants-respondents) opposed this request, while the state defendants took no position.

Proposed Consent Decree I was subsequently abandoned by the plaintiffs-respondents and municipal defendants-respondents who, on October 3, 1986, forwarded to the district court a second Proposed Consent Decree ("Proposed Consent Decree II"). Proposed Consent Decree II recognized that the average Philadelphia prison population was 4,300, and required the city to achieve

staged population levels of 4,100, 3,950 and 3,750, through prisoner releases or, in the alternative, by non-admissions.

Petitioner, District Attorney Ronald D. Castille, filed a proposed answer and proposed cross claims for declaratory and injunctive relief against the municipal defendants-respondents on October 9, 1986. The District Attorney then challenged the municipal defendants' power to enter into the proposed decree and alleged that the municipal defendants-respondents, acting through their counsel, the City Solicitor, had attempted to settle civil actions by agreeing to injunctive relief which would unlawfully interfere with the District Attorney's duties and functions.

On October 10, 1986 and October 27, 1986, Judge Shapiro heard evidence and subsequently accepted stipulations relating to petitioner's Motion to Intervene. Oral argument on this motion was heard on November 14, 1986. Argument on Proposed Consent Decree II itself was heard on October 10, 1986 and December 11, 1986. Petitioner's request to stay other matters before the court until after a ruling on his intervention motion was denied. He was, however, allowed to object orally to Proposed Consent Decree II, although his request to present evidence in support of those objections was denied.

On December 31, 1986, petitioner's motion to intervene as a party defendant was denied. Judge Shapiro found: (1) that his motion was untimely, (2) that he had insufficient interest in the litigation, and (3) that the municipal defendants-respondents were adequately representing the District Attorney's interest. She also simul-

taneously approved Proposed Consent Decree II.[2] Its provisions permitted the agreed-upon caps to be met by the simple release of prisoners or, if necessary, by a moratorium on admissions.

On January 8, 1987, petitioner appealed to the Third Circuit from the orders denying his Motion to Intervene and approving the Consent Decree. His subsequent request for a stay pending appeal was opposed by the settling parties and thereafter denied by the District Court on February 19, 1987. On March 6, 1987, however, the Third Circuit ordered "that the motion for a stay pending appeal by Ronald D. Castille is granted until further order of this Court solely as to its provisions of the consent decree placing caps on the population of the Philadelphia Prison System. . . ."

The District Court's denial of petitioner's motion to intervene was affirmed by a divided Third Circuit panel on May 15, 1987. The panel majority recognized that its application of an abuse of discretion, rather than a plenary, standard of review placed it in conflict with, at least, the Ninth Circuit. *See* App. 112. It also recognized that, under state law, petitioner "advocates specific bail levels and

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[2]By this order, the Philadelphia prison population could not exceed the following levels:

as of March 9, 1987	4,100 inmates
as of May 11, 1987	3,950 inmates
as of July 13, 1987	3,750 inmates

The parties to the decree have since amended the decree to reflect the following timetable:

as of July 20, 1987	3,950 inmates
as of September 14, 1987	3,850 inmates
as of October 19, 1987	3,750 inmates

may appeal bail determinations with which he disagrees,'' and that he ''also has the power to advocate sentences'' and ''to defend convictions in both state court actions and habeas actions in federal court. . . .'' *See* App. 115-116. Nevertheless, the panel majority concluded (1) that the ''District Attorney is not prevented from performing his statutory duties,'' and (2) that he did not have an interest sufficient to permit his intervention. *See* App. 119-120. The dissenting judge noted that, while the municipal defendants-respondents had the power to agree to population caps, they did not have the power to agree to an implementation procedure requiring the revocation of valid state sentences and bail determinations. *See* App. 130, 136-139.

On May 29, 1987, petitioner sought rehearing pursuant to Fed.R.App.P. 35 and 41. His companion Motion for Continuance of Stay Pending Rehearing was granted on June 9, 1987. On June 15, 1987, however, the Third Circuit denied rehearing (three of the nine circuit judges voted to rehear the case) and vacated the stay. Issuance of the judgment and mandate occurred on June 23, 1987. Five days later, petitioner filed a Motion to Recall and Stay of Issuance of Mandate and Execution and Enforcement of the Judgment Pending Petition for Certiorari. The Third Circuit, again by a panel divided two to one, denied this request on July 13, 1987.

Next, on July 20, 1987, petitioner asked this Court to recall and stay the Third Circuit's mandate pending certiorari. The Honorable Byron R. White ordered the application referred to this Court for disposition and stayed the Third Circuit's judgment and mandate pending full Court action. On August 3rd, this Court vacated the temporary

stay and denied petitioner's stay request. This timely petition for the issuance of a writ of certiorari followed.

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REASONS FOR GRANTING THE WRIT

IA. PETITIONER, THE PHILADELPHIA DISTRICT ATTORNEY, HAS AN INTEREST IN PROTECTING VALID PRISON INCARCERATION ORDERS. HE, THEREFORE, SHOULD BE PERMITTED TO INTERVENE IN A PRISON CONDITIONS LAWSUIT, WHICH PLAINTIFF INMATES AND MUNICIPAL DEFENDANTS-RESPONDENTS PLAN TO SETTLE BY CONSENTING TO THE RELEASE OF INMATES.

One of the significant issues here presented is whether the Philadelphia District Attorney should be permitted to object to federal "court orders that suspend the normal operation of the state's law regarding the confinement of convicted criminals." *Graddick v. Newman*, 453 U.S. 928, 940 (1981) (Opinion, Rehnquist, J., now C.J., as to the denial of a stay). Although "[o]ne might well regard the answer as self-evident," *id.*, the Third Circuit, despite this case's compelling facts, remarkably concluded otherwise. This Court should review that decision. If it is permitted to stand and otherwise followed, the criminal justice system nationwide will be adversely affected.

The municipal defendants-respondents here decided not to litigate the constitutionality of the challenged prison conditions and agreed, instead, to release hundreds of prisoners despite their incarceration under valid state judicial orders, obtained by petitioner pursuant to his state

mandated powers and duties. In so doing, the municipal defendants-respondents invoked the supremacy clause and used the federal court to legitimize actions which they could not otherwise lawfully or voluntarily undertake, absent proven constitutional violations. As detailed *infra* in section IB, the parties, utterly disregarding the constitutional role of the federal courts, principles of comity, and the permissible uses of the supremacy clause, called upon the district court to approve their agreement. This section establishes petitioner's interest in the lawsuit, in which respondents have thus far shielded their private, unlawful arrangements by successfully claiming that petitioner is without sufficient interest to intervene.

The Third Circuit's denial of petitioner's intervention motion and approval of the challenged consent decree voided many of the District Attorney's state-assigned duties, preempted state statutory law, conflicted with state case law, and contravened hundreds of valid state judicial sentencing and bail orders. Such disregard for a state's law enforcement scheme, when there has been no finding of any constitutional or federal law violation, mandates this Court's review.[3]

Petitioner's interest for intervention purposes must be determined by reference to his powers and duties under

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[3]Previously, three Justices of this Court voted to grant certiorari to determine whether, under the abstention doctrine, federal court relief would be appropriate in this case. *See Pernsley v. Harris I*, 106 S.Ct. 331 (1985) (Chief Justice Burger, Justice, now Chief Justice, Rehnquist, and Justice O'Connor dissented from the denial of certiorari). The comity considerations raised by the abstention issue still exist, and the case's later developments, *i.e.* a federal court's approval of relief which violates state law and is beyond the authority of either the court or the parties to grant, must be viewed as equally, if not more, troubling.

state law. *See Olden v. Hagerstown Cash Register, Inc.*, 619 F.2d 271, 273 (3d Cir. 1980).[4] Both respondents and the Third Circuit have concluded that petitioner lacks such an interest because this is a "prison conditions" rather than an "inmate release" suit, and, under state law, petitioner has no interest in prison conditions. This approach

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[4]To intervene as of right, a party must show that he has an interest in the case, that this interest will be adversely affected by the case's disposition, that the existing parties will not adequately represent the interest, and that the intervention application was timely. *See Commonwealth v. Rizzo*, 530 F.2d 501, 504 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976). The Third Circuit panel majority concluded that petitioner did not have an adequate interest and, therefore, did not reach the issues of timeliness of application and adequacy of representation. The dissenting judge, however, correctly concluded that petitioner had met all three requirements.

Regarding the timeliness of his motion, petitioner had no inkling before August of 1986 that the municipal defendants-respondents might agree to mandated releases. Previously, these same municipal officials vigorously litigated this case, and bitterly opposed the imposition of population caps and mandated releases in the parallel state action. (Indeed, they then, like petitioner now, took the position that mandated releases contravene valid state judicial orders and are beyond the authority of municipal officials to implement. *See* App. 162-171.) Petitioner moved to intervene almost as soon as he learned that the municipal defendants-respondents planned to settle the lawsuit, and just three days after respondents submitted Proposed Consent Decree I to the district court. Moreover, respondents abandoned this agreement and did not submit Proposed Consent Decree II to the district court until October 3, 1986.

Likewise, petitioner met his minimal burden of establishing that his interests were not being adequately represented. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 539 n.10 (1972). This inadequacy occurred when the municipal defendants, who had previously sought the suit's dismissal, decided in favor of a settlement which would affect petitioner's ability to perform his job. The city's interest then was in saving itself the expense of litigating the prison conditions issue. Petitioner's interest, of course, was and is in defending legally obtained sentences and bail determinations. *See also* Dissent, Garth, J., n.3 at App. 131-132.

misses the point. Petitioner has not sought to involve himself in consideration of the prison conditions. Indeed, he would have no interest if the parties had simply agreed to improve prison conditions as by increasing the level of services provided for the inmates or by removing inmates from the allegedly overcrowded prisons and incarcerating them elsewhere. He seeks only to prevent the release of inmates incarcerated pursuant to valid state judicial orders.

Pennsylvania statutory and case law clearly establishes petitioner's interest with respect to the release of incarcerated persons and his right to participate in the proceedings which result in such releases. The panel majority below failed to consider that, although municipal officials have the power to manage the prisons, they do not have the power, absent a finding of unconstitutional conditions, to release prisoners without following state law pertaining to the criteria and procedures for the release of prisoners. Further, it mischaracterized petitioner's interest as merely a generalized interest based on a concern that his law enforcement duties might be made a bit more difficult.[5]

Petitioner is not simply claiming that his job will be made more difficult. Rather, he will be entirely prevented from fulfilling some of his duties. Petitioner has a particularized interest in obtaining and defending bail orders and sentences of incarceration for those persons he prose-

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[5]The court compared the impact of the city's agreement to release prisoners to the impact of the city's budgetary decisions. It failed to recognize, however, that any decision, including a budgetary decision, may be improper if its effect is to prevent another state actor from properly carrying out his duties. *See Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193, *cert. denied*, 402 U.S. 974 (1971).

cutes. Respondents and the Third Circuit wrongly concluded that he is unaffected by the consent decree merely because it does not affirmatively state that he must either act or refrain from acting in a particular manner. A party may have an interest based on the practical effect of a consent decree on his state authorized duties even if he is not formally bound by specific reference in the decree. *See Cobb v. Aytch,* 539 F.2d 297 (3d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977).[6]

Pennsylvania courts have long recognized petitioner's interest in representing "the Commonwealth's interests in the enforcement of its criminal laws," *Commonwealth ex rel. Specter v. Bauer,* 437 Pa. 37, 41, 261 A.2d 573, 576 (1970), by defending and preserving the integrity of incarceration orders he has obtained. The federally approved consent decree effectively vitiates petitioner's ability to do this.[7] It is absurd to contend that petitioner has an

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[6]Although relied upon by the Third Circuit, *Cobb,* in fact, supports petitioner's position. In *Cobb,* inmates objected to their transfer between state and county prisons, and state officials agreed by a consent decree that the prisoners would not be transferred. The District Attorney there was found not to have standing only because he had no state-assigned responsibilities concerning transfers. The District Attorney, however, has state-assigned responsibilities with regard to releases. Therefore, like the superintendent in *Cobb* (who had standing because of a state statute requiring his participation in transfers), he has standing to object to the consent decree's effect on these duties.

[7]The implementation provisions of the consent decree (App. 75) specifically provide that releases will be accomplished "through the mechanism of the Bail Master appointed by the *Jackson* [*v. Hendrick*] court or otherwise." The mere fact that releases may be accomplished by an already-existing state court program fails to address petitioner's objections and the perversion of the existing scheme. First, although the *Jackson*

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interest in obtaining convictions and incarceration orders but no interest in their enforcement.[8] Indeed, the courts have specifically recognized petitioner's interest in objecting to the release of incarcerated persons even when there is no specific statute requiring his participation in that par-

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v. Hendrick court (which is not a court of record) presently releases the inmates with the lowest bail, there is no "cap" which must be met, and, thus, no sanction when the District Attorney challenges inappropriate releases. The federally mandated cap alters this situation. To meet it, the *Jackson v. Hendrick* court will be required to release many more inmates—inmates with significantly higher bail than those inmates now being released, although state judges have found them to be risks to the community or substantial flight risks. Indeed, *Jackson v. Hendrick* "lists" have already been increased from 150 to 200 cases per week, and will certainly be increased further given the City's recent inability even to consistently meet the July 20, 1987 cap which exceeds by 200 the final cap of 3,750 effective October 19, 1987. Further, petitioner can only assume that early releases will be obtained "otherwise" in proceedings absent his participation. Even if participation were allowed, however, the "cap" guarantees that such participation would not be legally meaningful, since the cap merely creates a choice of evils. Finally, if required population caps are not achieved by releases, an alternative drastic sanction will be employed: a mortorium on admissions. The only defendants exempted from such non-admissions are those charged with or convicted of murder, forcible rape or an aggravated assault or robbery at knife or gunpoint. The decree thus permits the non-admission of persons with an enormous potential for flight, as well as persons charged with or convicted of attempted murder, attempted rape, kidnapping, involuntary deviate sexual intercourse, robbery, aggravated assault or narcotics sales. Plainly, this circumstance will adversely affect both petitioner's and the public's interest.

[8]The interest in preserving valid incarceration orders is recognized by federal courts every day when state prosecutors appear to defend convictions at federal habeas corpus proceedings. *See, e.g., Matarese v. LeFevre*, 801 F.2d 98 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1353 (1987); *Conce v. Redman*, 780 F.2d 333 (3d Cir. 1985); *Forward v. Gernert*, 287 F. Supp. 680 (E.D. Pa. 1968).

ticular type of release. *See In re Miller,* 209 Pa. Super. 47, 51, 224 A.2d 89 (1966) (rejecting argument that the district attorney is without standing to appeal and stating "It is our view that one of the duties necessarily implied is to represent the Commonwealth generally in the administration of justice in the juvenile court, and *specifically with respect to the discharge of inmates from state correctional institutions.*") (emphasis added).[9]

Pennsylvania's statutory law and court rules confirm petitioner's interest in inmate releases. As noted, to achieve the required "cap," the consent decree provides for the release of pre-trial detainees by bail reductions, the release of sentenced prisoners two months early, and, if necessary, the non-admission of newly convicted and sentenced criminals. The provisions modifying bail orders and sentences plainly preempt state modification procedures. State law permits petitioner's participation both when a sentence is modified and when early parole is granted. Under state law, a sentence can be modified only within thirty days of imposition and only if a petition for modification was filed within ten days. *See* Pa.R.Crim.P., Rule 1410. Modification is not permitted once the Superior Court has affirmed the conviction on appeal. *See* Pa. R.A.P., Rule 1763. Both of these state statutes are violated to the extent the consent decree permits sentence modification. Further, even when a sentence is reduced

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[9]Although petitioner was denied intervention in the parallel state court prison conditions suit because his application was deemed untimely, a state appellate court did find that the release of pre-trial detainees to alleviate alleged overcrowding, "affects the prosecutorial interests of the District Attorney," and that his interest "may have justified intervention had his application been timely . . . ." *Jackson v. Hendrick,* 72 Pa. Commw. 63, 456 A.2d 229, 233 (1983).

by only one or two months, as respondents plan, state courts have specifically found that petitioner has standing to object.[10] Moreover, while sentencing courts (unlike prison officials) may grant parole to defendants serving county prison sentences (sentences of less than two years), they may do so only after petitioner has been given notice and a hearing has been held so that petitioner can object.[11]

Petitioner's state-mandated role with respect to the release of bailed defendants likewise has not been adequately preserved and protected. The prosecutor has a vital role in bail determinations,[12] and state law requires that "bail shall be such as to insure the presence of the defendant. . . ." Pa.R.Crim.P., Rule 4004. Yet, the consent decree effectively does not provide for consideration of the likelihood of flight by a defendant or any of the other pertinent considerations specified by state court rule. *See* Pa.R.Crim.P., Rule 4004; App. 173. Moreover, with

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[10]See *Commonwealth v. Yoder*, 249 Pa. Super. 389, 391 n.1, 378 A.2d 350 (1977) ("district attorney is the proper party to appeal the action by the lower court" which entered an order reducing defendant's sentence by one month). Moreover, Pennsylvania law does not permit the modification of a sentence without notice to petitioner. *See Commonwealth v. Hobson*, 306 Pa. Super. 99, 102, 452 A.2d 22 (1982).

[11]Inmates in Philadelphia county prisons may be granted parole only under authority of Pa.Stat.Ann., tit. 61, § 314 and § 331.26 (Purdon 1964). App. 173-175. The city may not create a new county parole procedure given Pa.Stat.Ann., tit. 61, § 331.1 (Purdon 1964): "it is the intent of this act to create a uniform and *exclusive system for the admisintration of parole* in this Commonwealth" (emphasis added).

[12]It is a prosecutor's responsibility to seek the incarceration of defendants who present substantial bail risks and to meet the burden of establishing such defendants' ineligibility for pretrial release. *See Commonwealth v. Truesdale*, 449 Pa. 325, 338, 296 A.2d 829 (1972); *Commonwealth v. Heiser*, 330 Pa. Super. 70, 72, 478 A.2d 1355 (1984).

the cap and the specter of non-admissions hanging over the prosecutor's head if sufficient releases are not ordered, any participation by petitioner is illusory. He can only decide who he wishes to have walking the street, not whether valid objections to release can be offered by him.[13] If cases of defendants incarcerated pre-trial were reconsidered with reference only to the state provided criteria, few would warrant bail reduction. Under the consent decree, however, many orders obtained by petitioner will necessarily be routinely voided. Bail orders must be reduced in a quantity sufficient to meet the population cap. Hence, the state-mandated criteria must necessarily be replaced with one inquiry: has the prison cap been met today?[14]

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[13]The District Court reasoned that a large number of Philadelphia's pre-trial inmates are held on "low bail" simply because they lack sufficient funds, and that this "[l]ow bail suggests that the judicial officer setting it did not consider such defendants a serious threat to the public safety." *See* App. 96. This is misleading. According to Philadelphia's bail guidelines, bail of $5,000 (which requires the posting of only $500 under the court bail program) is recommended for serious felonies such as attempted murder, voluntary manslaughter, aggravated assault, attempted rape, statutory rape, attempted involuntary deviate sexual intercourse, robbery, narcotics sales, murder, kidnapping, rape, arson, and any other first degree felony. (Bail commissioners may not deviate from these guidelines except under limited circumstances. *See* Phila.Crim.R. 500-520.) Such individuals are now routinely considered for release in the *Jackson v. Hendrick* court.

[14]Local authorities cannot impose rules which conflict with the Pennsylvania Rules of Criminal Procedure. *See Commonwealth v. Mitchell*, 242 Pa. Super. 543, 548, 364 A.2d 406 (1976). The consent decree, however, has precisely this effect in both the pre- and post-trial context. By way of further illustration,

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In sum, the Third Circuit has sanctioned a far-reaching and unwarranted intrusion into a state court criminal justice system—a system in which petitioner has a central role. Petitioner is the sole public official responsible for enforcing the criminal law and prosecuting criminals. *See* Pa.Stat.Ann., tit. 16, § 1402(a) (Purdon Supp. 1987); App. 172. It defies common sense and ignores state law to allege that this responsibility does not include a meaningful role in the process whereby bails or sentences are determined.[15] Petitioner's powers and duties under state law are fundamentally altered by the consent decree. The Third Circuit's contrary conclusion is wrong and must be corrected by this Court.

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post-trial sentencing reductions necessitated by the decree deprive petitioner of his state law right to appeal sentences that fall short of those required by the Mandatory Minimum Act or the sentencing guidelines. *See Commonwealth v. Sheridan*, 348 Pa. Super. 574, 502 A.2d 694 (1985) (petitioner has the right to appeal sentence below the guidelines); Pa.Stat.Ann., tit. 42, § 9717(a) and (b) (Purdon Supp. 1987) (mandatory sentence of twelve months for theft by deception against an elderly person, parole not permitted).

[15]The decree's third alternative, non-admissions, is simply a drastic form of bail reduction, sentence modification or early parole. Non-admissions of convicted criminals, or defendants likely to flee, do not, like a somewhat reduced budget or small courtrooms, make petitioner's job more difficult. Rather, they abrogate his state-assigned duty to enforce the law by seeking convictions and advocating and obtaining proper sentences. Although the courts below apparently believe otherwise, obtaining convictions and insuring that sentences imposed are actually served are unquestionably part of petitioner's power and duty "to represent the Commonwealth's interest in the enforcement of its criminal laws." *Mummau v. Ranck*, 531 F. Supp. 402, 405 (E.D. Pa. 1982), *aff'd*, 687 F.2d 9 (3d Cir. 1982), *quoting Commonwealth ex rel. Specter v. Bauer*.

IB. ABSENT PROVEN CONSTITUTIONAL VIOLATIONS, PARTIES MAY NOT INVOKE THE SUPREMACY CLAUSE TO SETTLE A PRISON CONDITIONS LAWSUIT UPON TERMS WHICH OVERRIDE STATE LAW AND STATE JUDICIAL ORDERS AND WHICH AUTHORIZE ACTIONS THAT COULD NOT OTHERWISE VOLUNTARILY BE UNDERTAKEN.

The second critical issue here presented is whether, absent a finding of constitutional violations, settling parties can invoke the supremacy clause to shield their otherwise unlawful arrangements. Cases and courts considering this question have been divided in their approaches. Unless this Court grants review and offers a definitive resolution, there is a high potential for widespread disruption by subsequent, such ill-based, consent decress.

Instantly, the findings below that the District Attorney lacks the requisite interest to intervene allowed the parties to this prison conditions suit to perfect an unlawful settlement adversely affecting criminal prosecutions and judicial orders.[16] This should not be permitted to occur.

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[16]Petitioner acted properly in attempting to make his objections by way of intervention. He could have brought a separate suit since consent decrees are open to challenge by persons not a party to them. *See e.g., Dunn v. Carey,* 808 F.2d 555 (7th Cir. 1986); *Samayoa v. Chicago Bd. of Educ.,* 807 F.2d 643, 645 (7th Cir. 1986); *see also Ashley v. City of Jackson, Mississippi,* 464 U.S. 900, 903 (1983) (Justice Brennan and Justice, now Chief Justice, Rehnquist dissenting from denial of certiorari). Courts have uniformly held, however, that objections to a consent decree are best made by a motion to intervene rather than by a separate action for an injunction in a different federal court, *see Adams v. Bell,* 711 F.2d 161 (D.C. Cir. 1983) (*en banc*), *cert. denied,* 465 U.S. 1021 (1984), or by a subsequent collateral attack, *see Society Hill Civic Ass'n v. Harris,* 632 F.2d 1045, 1052 (3d Cir. 1980).

It is the city's responsibility to provide facilities for all persons ordered to be incarcerated. Should the number of such persons overwhelm the city's financial resources, it may seek and obtain assistance from the state. *See County of Allegheny v. Commonwealth*, 507 Pa. 360, 376-78, 490 A.2d 402 (1985).[17] Municipal officials, of course, have the authority to manage their prisons. This authority gives them a role in the hiring and firing of prison employees, physical maintenance, and the provision of services. Their management function also permits them to respond to the inmates' suit by improving the prison conditions.

Contrary to the view of the municipal defendants-respondents and the Third Circuit, however, releasing inmates from prison, either individually (as here) or en mass, is not a component of prison management. It is the state court system which decides who belongs in prison. The city must accept all persons held under judicial orders although it may incarcerate them in a prison managed as

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[17]To alleviate prison overcrowding in Pennsylvania, the governor can place county prisoners in state facilities. *See* Pa. Stat.Ann., tit. 42, § 9762(3) (Purdon 1982). Other states have enacted legislation to address overcrowding, *see Benjamin v. Malcolm*, 564 F. Supp. 668, 690 (S.D.N.Y. 1983) (referring to such legislation enacted in Michigan, Ohio, Connecticut, and Georgia, and proposed in New York), *aff'd*, 803 F.2d 46 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1358 (1987), or obtained alternative places to incarcerate inmates, *see e.g.*, The New York Times, "Crowded Jails: Hard Solutions," B1 (August 14, 1987) (New York City leased a barge to house 396 inmates).

the city desires.[18] Here, however, the municipal defendants-respondents, absent any finding of constitutionally impermissible conditions, chose simply to release inmates. While they apparently believed release was the easiest option for them, their action usurped the powers of petitioner and other state actors. *See* section I, *supra*. *See also* Pa.Stat.Ann., tit. 42, § 9751 (Purdon 1982); Pa.R. Crim.P., Rule 1401 (trial judge imposes sentence); Pa.R. Crim.P., Rules 4003, 4004 (bail criteria).

The critical issue is this: when respondents presented their consent decree to the district court, that court was

> not being asked to put its sanction behind a substantive result that the parties would be empowered to achieve themselves, as is the case in the usual consent decree; rather, [the court was] being asked to effectuate a substantive result which the parties wholly lacked the jurisdictional power to bring about themselves.

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[18]The Philadelphia Home Rule Charter permits the Department of Public Welfare to determine the capacity of each city penal institution. *See* Philadelphia Home Rule Charter 5-700(c). There is no suggestion in the Charter, however, that the city can unilaterally release sentenced prisoners to meet these determined capacities. The basis of Philadelphia's prison overcrowding problem was identified three years ago by Pennsylvania Supreme Court Chief Justice Nix. He said it "results from the fact that past successive city administrations have avoided the inevitability of providing additional facilities through rationalization, dilatoriness and procrastination" and that the "indiscriminate wholesale release of, or the refusal to accept prisoners without consideration for the security and safety of the citizens of this city, would represent the epitome of irresponsibility and can obviously not provide a permissible solution to the present problem." *Jackson v. Hendrick*, Nix, C.J., Memorandum Opinion and Order of October 17, 1984, staying a prison population cap order.

Overton v. City of Austin, 748 F.2d 941, 956 (5th Cir. 1984).[19] In challenging this arrangement, petitioner does not contend that respondents must litigate the constitutionality of the prison conditions rather than settling their dispute by entering a consent decree, enforceable by the federal court. There are numerous actions which the municipal officials could agree, in such a consent decree, to undertake. But any action agreed to by the municipal defendants-respondents must be within their authority.

Here, respondents can enforce their present agreement only by gaining federal court approval and invoking the supremacy clause to enforce the federal order despite its conflict with state law. The supremacy clause, however, may be invoked to preempt state law only if there is a proven constitutional violation. *See Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983); *but see Badgley v. Santacroce*, 800 F.2d 33 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 955 (1987).

This Court should resolve the conflict among the circuit courts as to whether a consent decree can preempt state law in the absence of a finding of a federal law violation.[20] To hold that a consent decree can preempt

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[19]In *Overton*, the court concluded that, absent a "properly grounded judicial determination that the present charter provisions [establishing the method of election] are illegal, the consent of the parties provides an insufficient basis on which to judicially ordain a different system of council election and composition." *Id.* at 957.

[20]Some federal courts have insisted erroneously that any federal judgment may override conflicting state law or state court orders. *See e.g. Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 955 (1987); *San Francisco v. San Francisco Police*, 621 F. Supp. 1221 (N.D. Cal. 1985); *United States v. A.T.T.*, 552 F. Supp. 131, 155 (D.D.C. 1982), *aff'd, Maryland v. United States*, 460 U.S. 1001 (1983). Other

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state law, absent a federal law violation, is to ignore an enormous potential for abuse and collusion.[21] Parties could vitiate bothersome state laws simply by agreeing to ignore them and obtaining a federal court's settlement approval without even a *prima facie* showing of any federal law violation. *See Maryland v. United States*, 460 U.S. 1001, 1002 (1983) (Justice, now Chief Justice, Rehnquist, with whom Chief Justice Burger and Justice White joined, dissenting) ("I am troubled by the notion that a district court, by entering what is in essence a private agreement between parties to a lawsuit, invokes the power of the Federal Govment to preempt state regulatory laws.").[22]

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courts, however, have recognized that, absent a federal law violation, a consent decree entered in federal court cannot preempt state law. *See Overton v. City of Austin*, 748 F.2d 941, 956 (5th Cir. 1984); *Washington v. Penwell*, 700 F.2d 570, 573 (9th Cir. 1983); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1057 (3d Cir. 1980) (consent decree cannot authorize HUD to fund housing that does not comply with the local zoning ordinances).

[21]The question of the power of local officials to avoid troublesome litigation in federal court by entering consent decrees which impinge on state law arises not only in prison conditions suits but in a wide variety of other contexts. *See e.g., Firefighters Local Union v. Stotts*, 467 U.S. 561 (1984) (Title VII); *Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984) (election system); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045 (3d Cir. 1980) (low-income housing and zoning); *United States v. A.T.T.*, 552 F. Supp. 131 (D.D.C. 1982) (anti-trust), *aff'd, Maryland v. United States*, 460 U.S. 1001 (1983).

[22]These Justices again expressed their concern about remedies for alleged federal law violations which may themselves violate the law in *Bushey v. New York State Civil Service Commission*, 469 U.S. 1117 (1985) (dissenting from denial of certiorari, Chief Justice Burger, Justice, now Chief Justice, Rehnquist and Justice White). *See also Leslsz v. Kavanagh*, 807 F.2d 1243, 1253 (5th Cir. 1987) ("If as appellees argue, a federal court may take almost any action against a state to enforce a consent de-

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This case presents important questions about consent decrees which the Court did not have to decide in *Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063 (1986). The majority in *Local 93* believed that a federal court could enter a consent decree which provided broader relief than the court could have provided by itself if the parties had the legal authority to take the action in question voluntarily. But *Local 93* also recognized that a consent decree could not provide for an action that violates the law. Yet, that is what here occurred. The parties entered a consent decree which voids the authority of a non-party, the District Attorney, and binds the parties to perform actions which violate state law.[23]

The grant of certiorari is, thus, both appropriate and necessary. Settlement is often the preferred means of

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cree so long as it is 'consistent with' the 'spirit' of the applicable constitutional law and the decree itself, there is no limitation on the scope of the court's power."); *Duran v. Elrod*, 760 F.2d 756 (7th Cir. 1985) (absent a constitutional violation, federal courts should not by consent decree reallocate power among the branches of local government in order to permit inmate releases); *Citizens for a Better Government v. Gorsuch*, 718 F.2d 1117, 1135-1136 (D.C. Cir. 1983) (Wilkey, J., dissenting). ("The abuses to which this device [a consent decree] can be put are limited only by the almost inexhaustible imaginations of litigants . . . . EPA and OSHA, for example, could consent not to conduct on site inspections without first rendering 60 days notice."), *cert. denied*, 467 U.S. 1219 (1984).

[23]Respondents have noted that court-ordered release programs are fairly common and that the District Attorney is rarely a party in such suits. They have failed to note, however, the critical fact that, in essentially all of these suits, there has been a judicial finding that the prison conditions violate the Constitution. This differs substantially from the situation here where there is merely an allegation of a constitutional violation and the possibility of expensive or prolonged litigation.

concluding a lawsuit, and consent decrees can provide an efficient and satisfying means of settling complex disputes. Petitioner recognizes this and has no objection to any settlement which improves prison conditions without compelling the release or non-admission of inmates. Opposing parties, however, simply cannot be permitted to settle their differences by reaching a compromise which directly contravenes state law merely because they find it inexpensive and relatively simple to apply and enforce. What occurred here is particularly repugnant since the preempted state law was intended to ensure the proper working of Pennsylvania's criminal justice system and to protect the public from criminal attacks. The consent of the parties is simply an insufficient basis on which to judically ordain a new system of state inmate releases. This Court should so hold.

II. CERTIORARI IS ALSO NECESSARY TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER AN ABUSE OF DISCRETION OR PLENARY STANDARD OF REVIEW SHOULD BE USED IN RULING ON MOTIONS TO INTERVENE AS OF RIGHT.

Finally, certiorari is warranted to resolve the conflict among the circuits as to the proper standard of review in ruling on motions to intervene as of right.

The Third Circuit applied an abuse of discretion standard in reviewing petitioner Castille's motion to intervene as of right. While permissive intervention is reviewed under an abuse of discretion standard, intervention as of

right must be subject to plenary review. *See* Federal Rule of Civil Procedure 24(a) and (b). App. 172.[24]

The majority of the circuit courts have adhered properly to Rule 24(a) and subjected denials of motions to intervene as of right to plenary or *de novo* review. *See, e.g., County of Orange v. Air California,* 799 F.2d 535, 537 (9th Cir. 1986), *cert. denied,* 107 S.Ct. 1605 (1987); *H. L. Hayden v. Siemens Medical Systems, Inc.,* 797 F.2d 85, 87 (2d Cir. 1986); *United States v. Allegheny Ludlum Industries,* 517 F.2d 826, 841 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976); *Central States, Southeast & Southwest Areas Health and Welfare Fund v. Old Security Life Insurance,* 600 F.2d 671, 679 n.15 (7th Cir. 1979). The Third Circuit, however, has now joined the Fourth Circuit, *see Commonwealth v. Westinghouse Electric Corp.,* 542 F.2d 214, 216 (4th Cir. 1976), and at least some panels of the Second Circuit, *see United States v. Hooker Chemicals & Plastics, Corp.,* 749 F.2d 968, 990 (2d Cir. 1984) (Friendly, J.), in ignoring the difference between intervention as of right and permissive intervention.[25]

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[24]Rule 24(b) provides that a court may permit intervention if the rule's requirements are met and should exercise "its discretion" in deciding whether to allow permissive intervention. Courts have held unanimously that this requires application of an abuse of discretion standard. In contrast, Rule 24(a) states that intervention as of right "shall be permitted" when the requirements of the rule are met. The reference to discretion in Rule 24(b) is not included in Rule 24(a).

[25]Both the Third Circuit in this case and the Second Circuit in *Hooker Chemicals* referred to a law review article to support their approach. *See* Shreve, Questioning Intervention of Right—Toward A New Methodology of Decisionmaking, 74 Nw.U.L. Rev. 894 (1980). This article, however, specifically recognized that the present Rule 24(a) does *not* provide the trial court with

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This Court's resolution of that conflict is essential. Plenary review is vastly different from review under an abuse of discretion standard. The latter requires substantial deference towards the trial court's judgment. *See Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177, 1185 n.1 (1987) (Brennan, J., concurring). "[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court." *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116 (3d Cir. 1976) (*en banc*) *quoting Delno v. Market Street Railway*, 124 F.2d 965, 967 (9th Cir. 1942). Plenary review of a question of law, however, requires the court to make an independent evaluation of the legal issue. *See e.g., Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984). Given the very substantial differences in these standards of review, review by this Court is warranted.[26]

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discretion. The article recommended that Rule 24(a) be redrafted to give the trial court discretion. Although this Court, pursuant to its rule-making power, see 28 U.S.C.A. § 2072 (West 1982), could adopt and implement the proposed change, the Third Circuit was without any authority to make such a change in Rule 24(a).

[26]Respondents seek to dismiss the Third Circuit's error as a labeling problem and claim that the court called its review "abuse of discretion" but actually applied a hybrid of abuse of

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An abuse of discretion standard is especially inappropriate to review the intervention motion of a third party challenging the legality of a settlement agreement which will otherwise escape review. Intervention issues tend often to appear in large class action or institutional reform suits. They, therefore, freq ntly involve large numbers of persons and have very significant impacts on the public. Given this widespread significance, it is essential that intervention issues be uniformly reviewed under the most appropriate legal standard. This Court can assure that occurrence.

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discretion review and plenary review. This is hardly helpful to their position; rather, it demonstrates that the Third Circuit has only further muddled the analysis. The court specifically stated that it would reverse the district court's decision only if the court "reached a decision we are confident is incorrect." *See* App. 113. Plenary review permits the appellate court to substitute a decision it believes best even if it is not sure that the district court's decision was in error. At best, the Third Circuit applied a clearly erroneous standard of review, *see Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984), and not the searching inquiry conducted under plenary review.

CONCLUSION

For the foregoing reasons, petitioner, Ronald D. Castille, respectfully requests that a Writ of Certiorari issue to review the decision below.

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